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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955

No. 112

AMOS REECE,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

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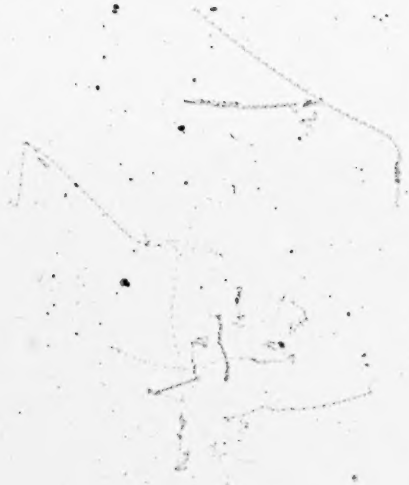

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955

No. 112

AMOS REECE,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

I.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia reversing petitioner's conviction on the first trial is reported below as *Reece v. State*, 210 Ga. 578, 82 S. E. 2d 10. The opinion of that court affirming petitioner's conviction on the second trial is reported as *Reece v. State*, 211 Ga. 339, 85 S. E. 2d 773. A motion for rehearing was denied on February 17, 1955. The decisions and judgments of the Superior Court of Cobb County, the trial court below, are unreported. This court granted certiorari May 31, 1955 (R. 28).

II.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. A., §1257 (3), wherein it is sought to review by certiorari a final judgment of the highest court of a state, to wit, the Supreme Court of Georgia. Respondent respectfully denies the jurisdiction of this Court to consider petitioner's assignment of error relating to the alleged systematic exclusion of Negroes from the grand jury, on the ground that this final ruling was made by the Supreme Court of Georgia on the first appeal of this case more than ninety (90) days from the date of the application for certiorari.

III.

QUESTIONS PRESENTED

1. Whether due process is denied to an accused by a ruling of state practice requiring that challenges to the grand jury indicting him be made prior to the return thereof, where the accused had been arrested and in jail for three days before indictment. An ancillary question which must be determined at the outset is whether or not this Court has jurisdiction to consider this question at all, in view of petitioner's failure to seek certiorari from the final decision of the Supreme Court of Georgia on the first trial adjudicating once and for all the legality of the indictment.

2. Whether petitioner's contentions as to systematic exclusion of members of the Negro race from service on the Board of Jury Commissioners was made at the proper time for consideration by the trial court. Assuming such objection was made at the proper time, the question then must be determined as to whether or

not such a practice constituted a denial of equal protection irrespective of whether or not discrimination as to the actual selection of the jury itself, either grand or petit, was shown.

3. Whether or not petitioner's objections to the trial jury were timely made, and assuming so, whether or not the allegations were sufficient to show a denial of equal protection.

IV.

STATEMENT OF THE CASE

Petitioner is an adult Negro man who stands convicted of the rape of a white woman in Cobb County, Georgia. At the date of commission of the offense, to wit, October 20, 1953, petitioner was an inmate of the Cobb County, Georgia Public Works Camp, serving a sentence of from four to twenty years on each (consecutive) of two counts of assault with intent to rape, and also, four to twenty years on each (consecutive) of two counts of stealing, both of which sentences had been imposed in Cobb Superior Court on February 23, 1945.[1]

The overwhelming evidence was to the effect that petitioner, while working on the roads, stopped at the house of the victim for a drink of water, and finding her alone, committed the offense of rape for which he was convicted.

At both the first and second trials, the State's testimony consisted of positive identification of petitioner by the victim, a confession by petitioner, and unimpeachable circumstantial evidence in several particu-

[1] Petitioner volunteered this information in his unsworn statement made upon his second trial. The specific details were procured from the Georgia State Board of Corrections.

lars.[2] In addition, at the first trial petitioner asserted the defense of insanity, and his own medical witness related the details of a confession made to him by petitioner. At the second trial, however, petitioner presented no evidence other than his unsworn statement.[3]

When the case was called for trial the first time on October 30, 1953, petitioner moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury indicting petitioner solely because of their race and color. (R. 1-3).

After hearing evidence thereon (R. 4-15) the motion was overruled (R. 4).

On appeal to the Supreme Court, this ruling of the trial court was affirmed on the ground that under Georgia law, an accused must challenge the grand jury indicting him prior to return of the indictment, where he has been arrested, is in jail awaiting trial, and is therefore apprised of the fact that his charges will be considered by a grand jury. (R. 16). However, this same decision of the Georgia Supreme Court found error in the charge, and remanded the case for a new trial. (R. 16, headnote 2). No appeal or application for certiorari was taken from this decision.

When the case came up for retrial in Cobb Superior Court on June 22, 1954, petitioner filed a new motion to quash the indictment and the array of trial jurors put upon him, and to render void the appointment of the grand jury commission. The basis of this motion

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[2] Although not included in the transcript of record printed in this Court, counsel for respondent have furnished the Court with copies of the trial transcript.

[3] See Ga. Code, §27-405 (1953 Rev.); §38-415 (1954 Rev.).

was first, that Negroes had been systematically and arbitrarily excluded from both grand and petit jury service solely because of their race and color in violation of the 14th Amendment, and second, that the superior court judge authorized by law to appoint the jury commissioners had systematically refused to appoint any Negro, solely because of race or color, in violation of the 14th Amendment. (R. 18).

The state demurred to this motion (R. 23), and the demurrer was sustained on appeal, which is sought to be reviewed here.

V.

ARGUMENT AND CITATION OF AUTHORITIES

1. *The Evidence Fails to Show Systematic Exclusion of Negroes From Jury Service.*

Both the allegations of the two motions to quash (R. 1, 18) as well as the evidence (R. 4, 14) relied upon in support thereof disclose that petitioner was basing his claim of denial of constitutional rights on the type of proof first fully recognized in *Neal v. Delaware* (1881) 103 U. S. 370, 26 L. Ed. 567 and later followed with unerring zeal.[4] This system of proof consists of showing that no Negroes have served on juries over an extended period of time, that they constitute an appreciable segment of the overall pop-

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[4] *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687; *Martin v. Texas* (1906) 200 U. S. 316, 50 L. Ed. 497; 26 S. Ct. 338; *Smith v. Mississippi* (1896) 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; *Norris v. Alabama* (1935) 294 U. S. 587, 79 L. Ed. 1074; 55 S. Ct. 579; *Hollins v. Oklahoma* (1935) 295 U. S. 394, 79 L. Ed. 1500, 55 S. Ct. 784; *Hale v. Kentucky* (1938) 303 U. S. 613, 82 L. Ed. 1050, 55 S. Ct. 753; *Pierre v. Louisiana* (1939) 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536; *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; *Patton v. Mississippi* (1947) 332 U. S. 463, 92 L. Ed. 76, 68 S. Ct. 184; *Hill v. Texas* (1942) 316 U. S. 400, 404, 86 L. Ed. 1559, 62 S. Ct. 1159; *Brown v. Allen* (1953) 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; *Hernandez v. Texas* (1954) 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667.

ulation and taxpayers of the county, that a sizeable number is qualified to serve, and lastly, a conclusion that the resulting exclusion was therefore based solely on race.

In the instant case, however, the evidence adduced by petitioner shows that in October, 1952, the jury boxes were revised for the express purpose of removing from the jury boxes the effect of any systematic exclusion which may have transpired in intervening years.

On cross-examination of Mr. LeCroy, Clerk of the Superior Court, the following was brought out:

"Q. I will ask you whether or not the jury box has been revised?

A. Yes, sir, under the law the jury boxes are revised every two years.

Q. When was the last time that the jury box was revised in this county?

A. The Jury commissioners began their work in August of 1952, and completed their work, as I recall it, around the first of October.

Q. I will ask you whether or not the revision has removed from the box or from the boxes any distinction as to the color or race of the members whose names are in the boxes?

A. No, sir, there isn't any; there is no distinction.

Q. Is that the revision that took place in 1952, that you described?

A. Yes, sir.

Q. Is there any systematic effort on the part of any one, either the court officials or the jury

commissioners, to systematically exclude persons of the colored race from either the grand or the petit jury?

A. No, sir.

Q. Is there any designation, by color or otherwise, that would attract attention of either a jury reviser or any court official, that would point out to them the distinction in race?

A. No, sir, all the names are listed on the same sort of paper.

Q. Are you present when the court summons both grand and petit jurors?

A. Yes, sir, as a rule.

Q. Have you observed the slips as drawn from the grand jury and petit jury boxes?

A. Yes, sir.

Q. Is there anything there to indicate by color or anything else that would attract the court's attention at all, or the sheriff's attention to the fact that the person being summoned for grand or petit jury service was a white or colored person?

A. No, sir." (R. 9).

The testimony of Mr. Terry, who had served as Acting Clerk, also was to the same effect. (R. 6-8).

In addition, it was brought out by the testimony of Negro witnesses testifying on the behalf of petitioner that within the year, and at that same term of court, they had been summoned for jury duty (Testimony of Ed Austin, R. 5; testimony of Sam Drew, R. 12; testi-

mony of Frank Addison, R. 12; testimony of John Hill, R. 14).

Under the holdings of this Court, the evidence as to what may have been the situation prior to revision of the jury lists became immaterial, and it thereby became the burden of petitioner to show discrimination "by direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas* (1950) 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

In the Cassell case, supra, this court noted that approximately eight years prior thereto, it had condemned a course of systematic exclusion based upon the type of proof relied upon here in the case of *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, and that accordingly, evidence of what had transpired prior to the Hill case would not be considered on a case arising subsequent thereto, when the jury lists had been revised in an attempt to comply with this Court's decision. In the Cassell case this Court declared:

> "In weighing this matter of custom, we limit ourselves, as do the parties, to the period between June 1, 1942, when *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, supra, was decided, and November 1947, when petitioner was indicted." *Cassell v. Texas*, 339 U. S. 282, 285, 94 L. Ed. 839, 846.

The Court then proceeded to hold that discrimination was not shown by the course of conduct subsequent thereto insofar as statistics were concerned, and that discrimination could only be shown with reference to the specific case. This evidence was found by

the Court from testimony of jury commissioners to the effect that they had sought to limit Negroes to proportionate racial representation.

Similarly, in *Brown v. Allen* (1953) 344 U. S. 443, 479, 97 L. Ed. 469, 500, 73 S. Ct. 397, this Court held immaterial evidence of past practices where it was shown that subsequently the jury boxes had been revised, the majority opinion declaring,

> "As this venire was the first drawing of jurors from the box after its purge in July 1949, following the new statute and *Brunson v. North Carolina*, decided here, March 15, 1948 [333 U. S. 851, 92 L. Ed. 1132, 68 S. Ct. 634], the long history of alleged discrimination against its Negro citizens by Vance County jury commissioners is not decisive of discrimination in the present case."

The Court then proceeded to note that the special venire actually contained the names of seven Negroes. In the instant case, the fact has been previously alluded to that four Negroes had been summoned the week of petitioner's trial.

With regard to the retrial of petitioner after reversal of his first conviction by the Georgia Supreme Court, the circumstances are no different, and the same evidence would be applicable. This is so because of two factors. First, although on the second trial the question was raised as to the legality of the petit jury as well as the grand jury, the testimony of the deputy clerk was to the effect that the grand and petit jury boxes (from which names are drawn each term to make up the grand jury and trial jury panels) were prepared in the following manner: First, pursuant to Ga. Code

Ann., §59-106,[5] the jury commissioners selected 25% of the names of male taxpayers from the tax receiver's books to be placed in the petit jury boxes, and from this number so chosen, 25% thereof were selected to be placed in the grand jury boxes (R. 6-7) so it is seen that the grand jury box was made up from the names appearing in the petit jury box, and therefore, evidence as to the former would be relevant with respect to the latter.

Secondly, under §59-106 of the Georgia Code, quoted previously (Footnote 5) the jury lists are revised only every two years unless otherwise directed by the judge of the superior court, so that it is apparent that the jury at petitioner's second trial was drawn from the same boxes used at his first trial.[6]

It is therefore submitted that petitioner failed to carry the burden of proof under the circumstances of this case, where it was shown without contradiction

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[5] Prior to its amendment in 1953 (Ga. Laws 1953, Nov.-Dec. Sess., p. 284) and 1955 (Ga. Laws, 1955, p. 247), Section 59-106, as applicable to this case, read:

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

[6] Records in Cobb Superior Court disclose this. The evidence shows that the jury boxes were revised in October 1952 (R. 5, 9), prior to petitioner's indictment on October 23, 1953 (Petition for Certiorari, p. 7), and his trial on October 30, 1953 (R. 1, Petition for Certiorari, p. 7). Petitioner was tried the second time on June 22, 1954 (Petition for Certiorari, p. 7; R. 18) prior to revision of the jury lists in the latter part of 1954.

by petitioner's own witnesses that the jury boxes had been revised for the purpose of eliminating the effect of any existing racial discrimination, and no subsequent course of exclusionary conduct based on race was shown nor any direct evidence submitted as to this specific case. Added to this is the testimony of the Clerk and Acting Clerk that there was no attempt, on revision, to exclude colored persons from service, and that there was no designation by color or otherwise which would disclose to the court officials selecting the jury from the boxes the race or color of the juror whose name was drawn therefrom. (R. 7-8-9).

Moreover, the allegations of both the first and second motion to quash (R. 1, 18) do not show facts from which an unreasonable ratio of white to colored names in the jury boxes could be inferred. The mere fact that according to the 1950 census there were 1,710 male Negro citizens 21 years of age or older does not mean too much, since under Georgia law, jury service at the time of this case was limited to male taxpayers.[7] This Court has previously noted that the tax lists may well have a higher proportion of whites than Negroes, due entirely to causes other than race. *Brown v. Allen* (1953) 344 U. S. 443, 473, 97 L. Ed. 469, 497, 73 S. Ct. 397.

Lastly events transpiring since revision of the jury lists in 195? bear out the fact that the jury boxes have been fairly and legally constituted.[8]

2. *The Question as to the Alleged Systematic Ex-*

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[7] Ga. Code Ann. §59-106, supra, footnote 5.

[8] The records of court show that since 1952, Negroes have frequently served on petit juries, and several times on the grand jury. In addition, several more were called for grand jury service but were excused on their own request. At one trial during this year, three Negroes served on one jury trying a case.

clusion of Negroes From the Grand Jury Is Not Subject to Review Here for Failure to Apply for Certiorari in Due Time.

It is provided in 28 U. S. C. A., §2101, that the time for making application for certiorari to this Court to review the judgment of the highest court of a state in criminal cases shall be as provided for by the rules of this Court. Rule 22 of the Revised Rules requires that the application be made within ninety days from entry of the judgment complained of. The decision of the Supreme Court of Georgia on the first appeal of this case, which determined the question as to composition of the grand jury adversely to petitioner, was rendered on May 11, 1954.[9] Certiorari was applied for on April 12, 1955, almost one year after the first decision of the Supreme Court. It is the contention of respondent that since this issue was forever foreclosed[10] by the first decision of the Supreme Court of Georgia, notwithstanding the fact that petitioner's conviction was therein reversed on a non-constitutional ground, and a retrial had, certiorari should have been applied for from this decision. This necessarily depends upon the question as to whether or not the judgment of the Supreme Court of Georgia finally adjudicating the constitutional issue, but reversing the conviction on a non-federal ground,[11] presented the degree of finality requisite for review under 28 U. S. C. A. §1257(3).

The classical statement as to finality is expressed in

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[9] Reece v. State, 210 Ga. 578, 82 S.E. 2d 10.

[10] At his second trial, petitioner was tried on the same indictment.

[11] The first trial was reversed because of an error in the charge. *See Reece v. State*, supra, Headnote (2a).

Bostwick v. Brinkerhoff[12] (1882), 106 U. S. 3, 27 L. Ed. 73, 74, 1 S. Ct. 15:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered . . ."

As an application of this rule, it has been held that generally, a judgment of the highest court of a state reversing the trial court below and requiring a new trial is not final so as to be subject to review by this Court.[13] and that a judgment must not only be final, but also complete.[14]

However, this rule is not without exception, for the exception has been expressly recognized that "an adjudication, final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be

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[12] The Bostwick case concerned a situation where an action for negligence had been brought in state court against the Directors of a National Bank, and a judgment overruling a demurrer based on the ground that such a suit could not be maintained in state court, was affirmed, and the case remanded with the direction that defendant be allowed to answer, over. Since the liability of the Directors of a National bank would depend upon federal law, the entire case would be one concerning federal questions, which differs from the instant case in that the only federal questions involved were those ruled on in the first decision of the Supreme Court of Georgia.

[13] *Johnson v. Keith* (1886), 117 U. S. 190, 29 L. Ed. 888, 6 S. Ct. 669. *Tracy v. Holcombe* (1861), 24 How. 426, 16 L. Ed. 742; *Bruce v. Tobin* (1917), 245 U. S. 18, 62 L. Ed. 123, 38 S. Ct. 7; *Gospel Army v. Los Angeles* (1947), 331 U. S. 543, 546, 91 L. Ed. 1662, 1665, 67 S. Ct. 1428.

[14] *Collins v. Miller* (1920) 252 U. S. 364, 370, 64 L. Ed. 616, 618, 40 S. Ct. 347.

reviewed without awaiting the determination of the general litigation."[15]

Next, it is believed that the peculiar situation which here arises with respect to the applicable state law compels the conclusion that the constitutional issue as to the Grand Jury should have been presented to this Court for consideration by certiorari immediately following the State Supreme Court's decision on the first appeal thereon.

Of course, it is not disputed that the mere *designation* by a state court as to the "finality" of its judgments is not binding on this court,[16] but this does not mean that the local law will not be looked to for its *effect* as to the finality,[17] and in any event, the test is whether the "order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."[18]

In the instant case, although petitioner's conviction was reversed because of an error in the trial court's

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[15] *Arnold v. United States for use of Guimarin* (1923), 263 U. S. 427, 434, 68 L. Ed. 371, 375, 44 S. Ct. 144; *United States v. River Rouge Improvement Co.*, (1926), 269 U. S. 411, 413, 70 L. Ed. 339, 943, 46 S. Ct. 144; *Swift & Co. v. Compania Colombina Del Caribe* (1950), 339 U. S. 684, 688, 94 L. Ed. 1206, 1210, 70 S. Ct. 861; *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U. S. 541, 546, 93 L. Ed. 1528, 1536, 69 S. Ct. 1221. The Cohen case presented a factual situation somewhat similar in principal to the instant case. The only point ruled upon and which was sought to be reviewed related to the applicability, in federal court in a diversity case, of a state statute requiring a plaintiff to post bond for costs. This, like the question as to the composition of the grand jury returning an indictment, dealt with a preliminary, incidental matter not affecting the principal merits of the case.

[16] *Market St. Ry. Co. v. R. R. Commission of California* (1945), 324 U. S. 548, 551; 89 L. Ed. 1171, 1176, 65 S. Ct. 770; *Richfield Oil Corp. v. State Board of Equalization* (1946), 329 U. S. 69, 72, 91 L. Ed. 80, 87, 67 S. Ct. 156.

[17] *Richfield Oil Corp. v. State Board of Equalization*, supra.

[18] *Department of Banking v. Pink* (1942), 317 U. S. 264, 268, 87 L. Ed. 254, 257, 63 S. Ct. 233; *Gospel Army v. Los Angeles* (1947) 331 U. S. 543, 547, 91 L. Ed. 1662, 1665, 67 S. Ct. 1428; *Market Street Ry. Co. v. R. R. Commission*, supra.

charge, the other division of the Georgia Supreme Court's opinion denying the constitutional claim as to the Grand Jury was settled once and for all. It was expressly so held on the second appeal, for the Supreme Court declared:[19]

> "In the first appearance of this case (Reece v. State, 210 Ga. 578, 82 S. E. 2d 10), this court ruled that the accused failed to raise objections to the competency of the grand jurors before the indictment was found against him and, therefore, the lower court did not err in denying his motion to quash the indictment for this reason; hence the attempt to again challenge the array of grand jurors and to quash the indictment upon the same ground must fail, as this question has already been adjudicated adversely to the defendant, and the court did not err in sustaining the demurrer thereto."

This was not a rule concocted by the Georgia Court solely for this case. In *Russell v. Mohr-Weil Lumber Co.*, 115 Ga. 35(3), 14 S. E. 275, it was said:

> "It is proper for a trial judge, upon a new trial which this court has ordered, to treat its rulings upon all questions passed upon here as decisive thereof, and *highly improper for counsel to again bring up those questions in the same case.*"

Even where the ruling of the appellate court was erroneous, and later overruled in a different case, it is nevertheless binding on the parties thereto upon retrial;[20] likewise, on a second appeal, the law of the

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[19] *Reece v. State*, 211 Ga. 339, 85 S. E. 2d 773.

[20] *Walker v. Rowe et al*, 41 Ga. App. 769 (2), 154 S. E. 722.

case as fixed by the first appeal is binding.[21]

In the same spirit of candidness which motivated petitioner to point out the questionable jurisdiction of this Court to review the grand jury question,[22] we feel constrained to refer to the case of *Georgia Railway & Power Co. v. Decatur* (1923); 262 U. S. 432, 435-437, 67 L. Ed. 1065, 1072-1073, 43 S. Ct. 615. In that case, a like contention was made with respect to the Georgia Supreme Court's ruling, on the first appeal, as to the propriety of granting an interlocutory injunction, but this Court held that irrespective of what may have been the ruling of the State appellate court as to its power on a second appeal, this did not affect the jurisdiction of this Court to review a judgment manifestly not final. The obvious distinction between the Decatur case and the instant case lies in the fact that rulings on interlocutory injunctions have traditionally and consistently been held to be not final. The peculiar nature of equitable relief and equitable procedures places that case on an entirely different footing from the instant one; on interlocutory injunction hearings, the issues quite frequently are the same ones eventually passed on at the final trial, but the scope of the proceeding is usually much more restricted, sometimes being confined solely to a hearing upon affidavits with the result that the situation remains fluid, subject to a different disposition upon the final hearing where the matters are more thoroughly considered. On the other hand, the ruling of an appellate court on an indictment fixes the status once and for all, and constitutes an adjudication that will

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[21] *Elyea, Inc. v. Cenker*, 184 Ga. 179 (2); 190 S. E. 585; *Walden v. Nichols*, 204 Ga. 532, 534(2), 50 S. E. 2d 105; *Manning v. Carroll*, 206 Ga. 158(2), 56 S. E. 2d 278.

[22] See the petition for certiorari, page 6.

control, without deviation, the course of all subsequent proceedings, however labyrinthine their paths may be. When the Court ruled upon the validity of the indictment, there was nothing else to consider in this respect—there was no chance that subsequent events might affect the case so as to change the application of this holding. This position is supported by the case of *Carondelet Canal & Navigation Co. v. Louisiana* (1914), 233 U. S. 362, 58 L. Ed. 1001, 34 S. Ct. 627, where a decision of a state appellate court, reversing its trial court, and disposing of the only federal question involved in the case was held subject to review, notwithstanding the fact that the case was remanded for further disposition on a non-federal issue.

Even should we assume, however, that the *Decatur* case, supra, is not distinguishable from the the instant one, it is submitted that the former is no longer controlling in view of the recent decision of *Johnson v. Muelberger* (1951), 340 U. S. 581, 583, 95 L. Ed. 552, 555, 71 S. Ct. 474. In the latter case a daughter of a decedent sought to attack in New York Court the validity of her father's divorce which had been obtained in Florida, the contention being that jurisdiction was lacking in the Florida Court due to failure of compliance with applicable residence requirements. The New York trial court sustained a demurrer to the petition, but the highest appellate court of the state reversed, and remanded the cause to the trial court below for further proceedings. In holding that this judgment was nonetheless final, this Court declared:

> "But in light of the record before us we assume that the requirement of Florida for a residence of 90 days as a jurisdictional basis for a Florida divorce *is no longer open as an issue upon return of these proceedings to the Surrogate's Court.* Ac-

cordingly the judgment under review is a final decree." (emphasis supplied)

Similarly, in *Pope v. Atlantic Coast Line R. Co.* (1953) 345 U. S. 379, 97 L. Ed. 1094, 73 S. Ct. 749, the general rule was recognized that a judgment of the highest state appellate court reversing a judgment below sustaining a demurrer would not be final so as to be reviewable, but it was held that where the demurrer raised a federal question controlling as to one issue, the requisite degree of finality would be satisfied although the decision of the state appellate court did not end the litigation. For a somewhat similar holding, see *Richfield Oil Co. v. State Board of Equalization* (1946), 329 U. S. 69, 91 L. Ed. 80, 67 S. Ct. 156.

Lastly, *Clark v. Williard* (1934) 292 U. S. 112, 117, 78 L. Ed. 1160, 54 S. Ct. 615, has generally been recognized as representing a departure by this court from the old rule that the "face of the judgment" alone would be looked to in determining finality.[23] This case held that the opinion of the state court could also be considered.

The statute limiting this Court's appellate jurisdiction to the review of "final" judgments seeks to avoid "piecemeal" litigation,[24] or the appealing of a case in fragments.[25] To permit a litigant to stand idly by after final adjudication by the state court on an indictment and then undergo a retrial on that same indictment only to raise the same question again before this Court

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[23] See 43 Col. L. R. 1002, 1004.

[24] *Pope v. Atlantic Coast Line R. R. Co.*, supra; *Louisiana Navigation Co. v. Oyster Commission* (1912), 226 U. S. 99, 101, 57 L. Ed. 138, 33 S. Ct. 78; *Canter v. American Ins. Co.* (1830) 3 Pet. 307, 7 L. Ed. 688.

[25] *Canter v. American Ins. Co.* (1830), 3 Pet. 307, 318, 7 L. Ed. 688, 692; *Collins v. Miller* (1920) 252 U. S. 364, 370, 64 L. Ed. 616, 618, 40 S. Ct. 347.

hardly pays due respect to the salutory rule; if anything, the policy of the law is frustrated.

3. *In Any Event, No Federal Question Is Presented With Respect to the Grand Jury.*

The motion to quash shows that petitioner had been in jail under charges of rape two days prior to the time of his indictment therefor, but that he failed to challenge the array of grand jurors prior to return of the indictment. (R.19)

In holding that this question was thereby waived, and could not be raised by plea in abatement filed at the trial, the Supreme Court of Georgia declared:

> "1. When, as here the accused has been arrested for the commission of a penal offense and is committed to jail, he is apprised of the fact that his case or the charge against him will undergo grand jury investigation, and it is incumbent upon him to raise objections to the competency of the grand jurors before they find an indictment against him. Such being the instant case, the court did not err in denying the motion to quash the indictment. See Turner v. State, 78 Ga. 174; Lascelles v. State, 90 Ga. 347, 372 (16 S. E. 945, 35 Am. St. R. 216); Parris v. State, 125 Ga. 777 (54 S. E. 751); Tucker v. State, 135 Ga. 79 (68 S. E. 786); Burns v. State, 191 Ga. 60, 64 (11 S. E. 2d 350); Harris v. State, 191 Ga. 243 (5), 249 (12 S. E. 2d 64). And this rule applies whether the accused had counsel before the indictment was returned against him or not. Tucker v. State, supra." *Reece v. State*, 210 Ga. 578, 82 S. E. 2d 10.

In so holding, the Georgia Supreme Court was merely following a long line of Georgia decisions dating back as early as 1882. *Williams v. State* (1882) 69 Ga.

11 (5c); *Lee v. State* (1883) 69 Ga. 705 (1b); *Turner v. State* (1886) 78 Ga. 174 (1); *Lascelles v. The State* (1892) 90 Ga. 347, 372 (3), 16 S. E. 945, 35 Am. St. R. 216; *Fisher, et al v. State* (1894) 93 Ga. 309 (1), 20 S. E. 329; *Shope v. State* (1898) 106 Ga. 226 (2), 32 S.E. 140; *Simpson v. State* (1899) 110 Ga. 249, 34 S.E. 204; *Folds v. State* (1905) 123 Ga. 167 (2), 51 S. E. 305; *Edwards v. State* (1905) 121 Ga. 590 (2), 49 S. E. 674; *Parris v. State* (1906) 125 Ga. 777 (3), 54 S. E. 751; *Tucker v. State* (1910) 135 Ga. 79 (1), 68 S. E. 786; *Brown v. State* (1910) 8 Ga. App. 397 (1), 69 S. E. 37; *Cabaniss v. State* (1910) 8 Ga. App. 129 (4), 136, 68 S. E. 849; *Tompkins v. State* (1912) 138 Ga. 465, 75 S. E. 594; *Brooks v. State* (1912) 12 Ga. App. 104, 105, 76 S. E. 765; *Evans v. State* (1915) 17 Ga. App. 120 (2), 86 S. E. 286; *Stapleton v. State* (1916) 19 Ga. App. 36, 90 S. E. 1029; *West v. State* (1917) 19 Ga. App. 142 (1), 91 S. E. 216; *Smith v. State* (1940) 62 Ga. App. 498 (1), 8 S. E. 2d 797; *Burns v. State* (1940) 191 Ga. 60 (3), 11 S. E. 2d 350; and *Hawkins v. State* (1952) 86 Ga. App. 872, 874, 72 S. E. 2d 778.

In the Tucker case, supra, the Supreme Court stated:

". . . Held, that a person accused of murder, and who was in jail awaiting indictment, but made no objection to the grand jury until after they had found an indictment against him and he had been put on trial thereunder, could not not have the indictment quashed by a plea in abatement because of the illegality of the time when the term of court was held at which the grand jurors were drawn; and this is true although the plea in abatement was interposed before pleading to the merits, and the attorney for the accused stated that he had not been employed until after the indictment had been

found, and that he and his client did not know of the irregularity until after it had been so found. *Turner v. State*, 78 Ga. 174; *Lascelles v. State*, 90 Ga. 347, 372 (16 S. E. 945, 35 Am. St. R. 216); *Folds v. State*, 123 Ga. 167 (51 S. E. 305); *Parris v. State*, 125 Ga. 777 (54 S. E. 751)."

This definitely answers petitioner's allegations that he did not know of the alleged irregularity in composition of the grand jury, and that counsel had not been appointed for him until after indictment. (R. 19, par. 4).

It is generally recognized that there are two methods of raising the objection that a grand jury returning an indictment was improperly constituted, viz.: by challenge to the array before return of the indictment, or by motion to quash the indictment before trial,[26] and while it is not disputed that some states permit the last-mentioned procedure, it seems equally clear that a majority of the jurisdictions passing upon the question are in accord with Georgia.

The following states hold that objections to the grand jury must be made before indictment.

ARKANSAS

Tillman v. State (1915) 121 Ark. 322, 181 S. W. 890.

CALIFORNIA

People v. Moice (1860) 15 Cal. 329.

People v. Arnold (1860) 15 Cal. 476.

IDAHO

State v. Corcoran (1900) 7 Idaho 220, 61 P. 1034.

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[26] *People v. Munday* (1920) 393 Ill. 191, 127 N. E. 364, cert. den. 254 U. S. 638.

INDIANA

Sisk v. State (1953) 232 Ind. 214, 110 N. E. 2d 627.

IOWA

State v. Crisinger (1923) 197 Iowa 613, 195 N. W. 998.

State v. Ingalls & King (1864) 17 Iowa 8.

MISSISSIPPI

Flowers v. State (1949) 209 Miss. 86, 41 So. 2d 352, 355 (2).

Lott v. State (1948) 204 Miss. 610 (1), 37 So.2d 782.

State v. Forbes (1924) 123 Miss. 425, 98 So. 844.

Cain v. State (1905) 86 Miss. 505, 38 So. 227.

Dixon v. State (1896) 74 Miss. 271, 20 So. 839 (4).

MISSOURI

Varble v. Whitecotton (1945) 354 Mo. 570, 190 S. W. 2d 244, 246 (3, 4).

State ex rel Graves v. Sothern (1939) 344 Mo. 14, 124 S. W. 2d 1176.

State v. Seidler (1924) 267 S. W. 424.

State v. Welch (1862) 33 Mo. 33.

NEW JERSEY

State v. Ruffu (1930) 8 N. J. Misc. 392, 150 A. 249, 252.

NEW YORK

People v. Block (1947) 74 N. Y. S. 2d 430 (2, 3) 190 Misc. 78.

People v. Scannell (1902) 75 N. Y. S. 500 (4), 37 Misc. 345.

PENNSYLVANIA

Commonwealth v. Craig (1902) 19 Pa. Super. Ct. 81.

TENNESSEE

Rivers v. State (1906) 117 Tenn. 235, 96 S. W. 956.
Ransom v. State (1906) 116 Tenn. 355, 96 S. W. 953.

TEXAS

Martin v. State (1952) 157 Tex. Cr. R. 210, 248 S. W. 2d 126.

Jones v. State (1949) 154 Tex. Cr. R. 241, 226 S. W. 2d 437 (1).

Ex Parte Traxler (1945) 148 Tex. Cr. R. 550, 189 S. W. 2d 749, 752.

Williams v. State (1943) 146 Tex. Cr. R. 294, 174 S. W. 2d 261.

Tyson v. State (1943) 146 Tex. Cr. R. 128, 171 S. W. 2d 496.

Wright v. State (1941) 143 Tex. Cr. R. 447, 158 S. W. 2d 787, 789 (1).

Winn v. State (1940) 138 Tex. Cr. R. 202, 135 S. W. 2d 118.

Armentrout v. State (1939) 138 Tex. Cr. R. 238, 135 S. W. 2d 479.

Wilson v. State (1931) 117 Tex. Cr. R. 63, 36 S. W. 2d 733, 735.

Frey v. State (1928) 109 Tex. Cr. R. 168, 3 S. W. 2d 459.

Hunter v. State (1927) 108 Tex. Cr. R. 142, 299 S. W. 437.

Walker v. State (1925) 98 Tex. Cr. R. 663, 267 S. W. 988.

Smith v. State (1924) 97 Tex. Cr. R. 6, 260 S. W. 602 (1).

Staton v. State (1923) 93 Tex. Cr. R. 356, 248 S. W. 356 (2).

Hickox v. State (1923) 95 Tex. Cr. R. 173, 253 S. W. 823, 827 (13, 14).

Anderson v. State (1913) 70 Tex. Cr. R. 250, 157 S. W. 150.

Welch v. State (1912) 66 Tex. Cr. R. 525, 147 S. W. 572, 575 (1, 2).

Smith v. State (Tex. Cr. R. 1900) 56 S. W. 54 (1).

Webb v. State (Tex. Cr. R. 1897) 40 S. W. 988.

UNITED STATES

Agnew v. United States (1897) 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

Wolfson v. United States (1900) 101 F. 430, 102 F. 134.

United States v. Butler (1877) Fed. Cas. No. 14,700 (3), 1 Hughes 457.

United States v. White (1838) Fed. Cas. No. 16,679, 5 Cranch C. C. 457.

Of course, where a defendant did not have the opportunity of challenging the grand jury, as where it was impaneled and sworn prior to commission of the offense, the objection may be raised by plea in abate-

ment or other procedure provided by the state. *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687.

The Carter case is generally held to constitute the only exception to the rule, and illustrates what is meant by language in some decisions stating that the objection could be raised after indictment where the accused did not have "an opportunity" to raise it beforehand. See *Tillman v. State* (1915) 121 Ark. 322, 181 S. W. 890; *Tyson v. State* (1943) 146 Tex. Cr. R. 128, 171 S. W. 2d 496.

Language may also be found in some of the cases previously cited herein to the effect that the objection could be raised by plea after indictment on behalf of an accused who was unaware that the grand jury was considering charges against him, but the cases almost without exception declare that where an accused was put on notice thereof, as where he had been arrested and bound over, or had been released on bond, it is incumbent that he challenge the grand jury before return of the indictment. Neither is it any excuse that the accused is in jail, as it has been held that he must request to be taken before the grand jury for the purpose of making challenge. *Sisk v. State* (1953) 232 Ind. 214, 110 N. E. 2d 627; *Walker v. State* (1925) 98 Tex. Cr. R. 633, 267 S. W. 988; *Webb v. State* (Tex. Cr. R. 1897) 40 S. W. 988.

In the instant case, the petitioner was being held in jail two days before his indictment, and judging from his past experience with the law, it is only reasonable to assume that he either knew or should have known that his case would be considered.

Moreover, the irregularity urged here is not that the grand jury indicting him was prejudiced or biased, or

that any member thereof was disqualified to act.

In *United States v. Gale* (1883) 109 U. S. 65, 27 L. Ed. 857, 859, this Court noted that an objection to the array as a whole was less serious in nature than one where some juror was disqualified, for, after stating the general proposition that objections must be made before trial, declared:

> "These remarks apply with additional force where the objection is not to the disqualification of jurors who are actually sworn upon the panel, but to the exclusion or excuse of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable, and have all the necessary qualifications it is of less moment to the accused what persons may have been set aside or excused."

It is also deemed appropriate to further discuss the Gale case insofar as it held that an objection to the grand jury need not necessarily be made before return of the indictment, but might be plead in abatement prior to trial.

To begin with, the Gale case, supra, did not involve a criminal prosecution in state court, but concerned prosecution in federal court, and was not a holding on constitutional grounds, but was simply a holding that as a matter of practice in the federal courts in federal prosecutions, an accused could raise objections to the grand jury by either challenge or plea.

In fact, judging from the Court's quotation from Wharton and its approval thereof (109 U. S. at p. 72), it might be said that a plea would be available only where the accused had not had a previous opportunity of asserting his objection.

However, whatever may have been the holding of this Court in the Gale case, it was subsequently settled that objections to the array of grand jurors could not be raised after return of the indictment. In *Agnew v. United States* (1897) 165 U. S. 36, 41 L. Ed. 624, 627, 17 S. Ct. 235, the defendant filed a plea in abatement five days after return of the indictment, but before trial.

In holding that the objection should have been made earlier, this Court declared:

> "One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement, the latter in all cases of contested fact being the proper remedy. *United States v. Gale*, 109 U. S. 65 [27: 857]."

However, irrespective of what the rule may or may not be in federal prosecutions, the ruling of a state court as to the required manner of challenging the grand jury based on racial discrimination is binding on this Court. *Tarrance v. Florida* (1903) 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 403.

The ruling of the state court having been based on a question of state procedure, there is no federal question. *Thorington v. City Council of Montgomery* (1893) 147 U. S. 490, 37 L. Ed. 252, 13 S. Ct. 394; *Hartford Life Ins. Co. v. Johnson* (1919) 249 U. S. 490, 492, 63 L. Ed. 722, 724, 39 S. Ct. 336; *Edleman v. California* (1953)

344 U. S. 357, 358, 97 L. Ed. 387, 391, 73 S. Ct. 293.

Of course this is not to say that the sufficiency of the allegations to properly raise a constitutional claim is not a federal question,[27] but the *time* and *mode* are determined solely by state procedure.[28]

Although no due process question was raised at any stage of the proceedings below attacking the requirement of Georgia law that objections to the grand jury be raised before return of the indictment, and consequently is not before this Court,[29] it goes without saying that a rule of law which has been applied so long by so many courts, including this Court, could hardly be considered violative of the "fundamental fairness essential to the very concept of justice,"[30] or those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as law of the land."[31]

It must never be forgotten that a state is free to regulate the procedure of its courts in accordance with its own conception of policy unless in so doing it offends "some principle of justice so rooted in traditions and

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[27] *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687; *Rogers v. Alabama* (1904) 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 259.

[28] *Layton v. Missouri* (1902) 187 U. S. 356, 47 L. Ed. 214, 23 S. Ct. 137; *Jacobi v. Alabama* (1902) 187 U. S. 133, 47 L. Ed. 106, 23 S. Ct. 48; *Baldwin v. Kansas* (1889) 129 U. S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *Young v. Ragen* (1949) 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073; *Hardware Dealers Insurance Co. v. Glidden Co.* (1931) 284 U. S. 151, 158, 76 L. Ed. 214, 219, 52 S. Ct. 69; *Grand Rapids and Indiana Railroad Co. v. Butler* (1893) 159 U. S. 87, 40 L. Ed. 85, 15 S. Ct. 991; *Barbour v. Georgia* (1919) 249 U. S. 454, 63 L. Ed. 704, 39 S. Ct. 316; *Nevada-California, Oregon Railway Co. v. Burris* (1917) 244 U. S. 103, 61 L. Ed. 1019, 37 S. Ct. 576.

[29] *Hedgebeth v. North Carolina* (1948) 334 U. S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185; *Foster v. Illinois* (1947) 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716.

[30] *Lisenba v. California* (1941) 314 U. S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280.

[31] *Hebert v. Louisiana* (1926) 272 U. S. 312, 316, 71 L. Ed. 270, 47 S. Ct. 103.

conscience of the people as to be ranked fundamental";[32] or "implicit in the concept of ordered liberty";[33] and due process is not violated simply because another mode of procedure may seem fairer or wiser or give a surer promise of protection.[34]

4. *No Denial of Equal Protection Arises from Appointment of the Jury Commissioners.*

This novel contention is asserted by petitioner at pages 15-17 of his brief.

The Georgia code provides for appointment by the judge of the superior court[35] of "six discreet persons" to serve as jury commissioners, whose duty it is to prepare the jury boxes from which the names of grand and petit jurors are selected.[36]

The jury commissioners themselves do not try cases, or in any way pass upon the guilt of an accused, and it logically follows that whether or not a Negro ever served on the jury commission is immaterial with respect to a Negro charged with a criminal offense. The latter's only interest is assurance that members of his race have not been systematically and arbitrarily excluded from the juries indicting and trying him. The

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[32] *Brown v. Mississippi* (1936) 297 U. S. 278, 285, 80 L. Ed 682, 686, 56 S. Ct. 461.

[33] *Palko v. Connecticut* (1937) 302 U. S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149.

[34] *Snyder v. Massachusetts* (1934) 291 U. S. 97, 106, 78 L. Ed. 674, 677, 57 S. Ct. 330.

[35] Ga. Code Ann., §59-101. "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

[36] Ga. Code Ann., §§59-106, 59-108.

nature of this right was expressly defined by this Court in *Martin v. Texas* (1906) 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338, viz.:

> "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

Just as the mere fact that Negroes have not served on a jury does not by itself show discrimination,[37] *a fortiori*, the mere fact that no Negroes served on the Board of Jury Commissioners does not show discrimination, since it cannot be assumed that an all-white jury commission is incapable of selecting jurors without regard to race or color.

If this contention of petitioner be sound, it necessarily follows that he is denied equal protection by whatever decision this Court renders, since no Negro has ever been appointed to the Supreme Court by any President.

Similarly, it could be said with equal force that a Negro could not be tried under any Georgia law, since the Legislatures enacting those laws have not had any Negro members since the Reconstruction Period.

There is a good reason why an individual charged with crime is afforded the right to demand that members of his race be not arbitrarily excluded from jury service, which is found in the traditional notion that a

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[37] *Ex Parte Virginia* (1880) 100 U. S. 313, 322, 25 L. Ed. 667, 671; *Martin v. Texas* (1906) 200 U. S. 316, 319, 50 L. Ed. 497, 26 S. Ct. 338; *Thomas v. Texas* (1909) 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393; *Franklin v. South Carolina* (1916) 218 U. S. 167, 54 L. Ed. 985, 30 S. Ct. 640.

person should be tried by his peers, which in our classless society means "a fair cross-section of the community." *Ballard v. United States* (1946) 329 U. S. 187, 191, 91 L. Ed. 181, 184, 67 S. Ct. 261. Obviously, this same consideration does not apply to jury commissioners.

Neither did this Court hold otherwise in *Hernandez v. Texas* (1945) 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667. That decision turned upon a finding with respect to jurors themselves.

The Georgia law does not itself declare that Negroes are not qualified jury commissioners, but leaves it a matter of discretion with the judge of the superior court as to whom he will appoint.

In *Marbury v. Madison* (1803) 1 Cranch 137, 167, 2 L. Ed. 60, 70, it was recognized that the power to appoint public officials is a political function resting in the discretion of the person having the responsibilty of exercising it, and in *Snowden v. Hughes* (1944) 321 U. S. 1, 7, 88 L. Ed. 497, 502, 64 S. Ct. 397, reh. den. 321 U. S. 804, it was held that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause."

Therefore, if an aspirant to an office could not complain, it hardly comports with common sense to say that petitioner stands in a better position to raise the question.

Whether any given person shall be employed by the state is in the sound discretion of state officials, and so long as the law itself does not undertake to control that discretion, as where, for example, the law expressly prohibits employment of any designated race of persons, no complaint can validly be made. *Alston v.*

School Board of Norfolk (1940 CA 4th) 112 F 2d 992, 130 ALR 1506.

Should this Court undertake to control the discretion of public officials in the exercise of their appointing power so as to determine in every given situation whether or not the appointment had been made without regard to color, it would constitute an unwarranted venture into the field of politics, both on the state and national level, since all public appointments, to a more or less degree, are made with these considerations in mind.

Although we are told in emphatic tones that the Negro will never participate in the administration of justice on an equality with white persons until his race is represented on the commissions, this statement apparently overlooks the multitude of decisions emanating from this Court in the past several decades which has fully protected the rights of every citizen complaining of discrimination.

Moreover, as was said in *Ownbey v. Morgan* (1921) 256 U. S. 94, 110-112, 65 L. Ed. 837, 846, 41 S. Ct. 433:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, . . ."
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> * * *
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> "However desirable it is that the old forms of procedure be improved with the progress of time,

it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."

VI.

CONCLUSION

For the foregoing reason, the decision of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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